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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 49

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION, AND HAZELTINE CORPORATION, A CORPORATION,
Respondents.

REPLY BRIEF FOR THE PETITIONER ZENITH RADIO CORPORATION.

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REPLY BRIEF FOR THE PETITIONER ZENITH RADIO CORPORATION.

FOREWORD.

A very serious charge is made in the respondent's brief: that petitioner, one of the leading electronics companies in the world, and its counsel, who has been practicing antitrust law for over 40 years, and its chief executive officers are all engaged in an attempt "to misuse antitrust laws by treble damage claims knowingly made without basis in fact." It therefore is highly significant that respondents cannot by record reference controvert one single fact set out in petitioner's statement of the case or point to one error in any record reference contained in the original brief. Apparently, in desperation, respondents and their counsel have adopted the tactic of attempting to obscure

record facts by unsupported charges of an irresponsible character against the integrity of petitioner and its counsel.

The respondents seek to cast themselves in the role of victims at the hands of Zenith because they say they are small companies and Zenith is a large one.

While this contention is irrelevant to the issues in this case, it probably should be pointed out that the consolidated respondent companies are not small. In 1962, they had a gross annual income of forty seven million dollars; over one million of which was income received from illegal patent pools (Finding III, A. 2893; Def. Ex. 1, A. 939, 951; Def. Ex. 32, A. 1128-1130). And while their statements show only net assets of approximately twenty-one million dollars, they own over 500 domestic and foreign patents and patent applications which they assert control the color television business of the entire world (Def. Ex. 1, A. 946) which are carried in their consolidated balance sheet at cost less depreciation for a nominal value (A. 950). Respondents say that they have "a major patent position in color television on the basis of its many important patents which appear to cover television receiver designs now on sale by substantially all manufacturers in the television receiver industry." Respondents would have this court ignore the fact that they have been found in this case to be in a conspiracy which violates the Federal antitrust laws with the following companies whose stipulated worth is set forth below. These companies are (A. 91-100):

Australian Radio Technological Services and Patents Company with approximately $240,000 of capital;

Amalgamated Wireless, Ltd., with capital of $12,000,000 and total assets in excess of $31,200,000 and an annual turnover in excess of $40,000,000;

Canadian Marconi Co., with total assets as of 1962 in excess of $15,000,000 and a net worth of over $9,000,000;

Canadian Westinghouse Co., Ltd., with total assets as of 1962 in excess of $79,000,000;

Northern Electric Co., Ltd. with net worth in excess of $80,000,000;

Standard Radio, Ltd. with a net worth in excess of $2,000,000;

Canadian Radio Patents, Ltd., with an authorized capital of $50,000 representing Canadian General Electric Co., Canadian Westinghouse Co., Northern Electric Co., Canadian Marconi, Philips Electronics Industries and Hazeltine Corporation;

Electric and Musical Industries, Ltd., which is one of the largest public companies in the electronics industry in England;

General Electric Co., Ltd., with assets of over $225,000,000;

Marconi Wireless Telegraph Co., which is capitalized at $91,600,000;

Philips Electric Co., Ltd., which company controls Philips-Croyden Works; Philips-Hamilton Works; Philips Records, Ltd.; Mullard Radio Valve Co.; Cossor Radio & Television, Ltd.; Stella Radio & Television Co. The radio and television branch of this business employs over 4,000 workers and ranks as one of the world's leading commercial enterprises.

Pye Ltd., which is capitalized at $21,600,000;

Standard Telephones & Cables, Ltd., which is capitalized at $33,600,000 employing 26,000 persons; and

The Gramophone Company, Ltd., which is capitalized at $8,016,000.

Thus, we see that Zenith, in its effort to compete, is confronted by companies with aggregate assets of hundreds of millions of dollars and is obviously engaged in a fight for its very life against such conspirators in the foreign

markets here involved. As we have pointed out in our original brief, unless Zenith is protected by the antitrust laws, its entire foreign business amounting to millions of dollars a year in Canada alone (Pet. Br. Appendix, p. A. 26) is exposed to destruction and the damage to the company and its thousands of stockholders and employees would be incalculable.

As to the claim made in respondent's brief that they are victims; in view of the scurrilous remarks of counsel, the Court should bear in mind that the trial court found that the respondents started the instant suit pursuant to the Canadian conspiracy (A. 11, 2857), and that this suit, as its then counsel admitted in open court, is part of an effort to enforce a patent restriction against imports imposed by the Canadian pool (A. 131-132).

The instant counterclaim is claimed to be stale but, as the proofs show, it was filed as soon as the four years of damages had accrued in England and Australia and was a compulsory counterclaim which Zenith was forced to file in this suit or forever lose its claim. The claim respondents now make and which they made at length in the court below, that the courts are entitled to ignore all the activities of respondents' co-conspirators and confine respondents' liability to some amount commensurate with its net worth discloses a complete departure from the well established rule that each co-conspirator is liable for all the damage caused by every conspirator in the course of the conspiracy.

Respondents have deliberately relegated the discussion of the Canadian proofs to which they have no defense whatever, to a sandwich position in their brief between a great deal of irrelevant and disingenuous argument concerning England and Australia.

One more point is deserving of mention in this foreword. In view of the attack on the evidence in this case as "ap-

cient", it should be noted that all of this evidence was introduced by pre-trial stipulation and the competency of the evidence on the conspiracy and damage issues was expressly admitted. See Evidence Stipulation (A. 72-90).

QUESTIONS PRESENTED.

Respondents have presumed to limit this Court's jurisdiction under its grant of the writ of certiorari. The questions raised here are set forth at pp. 3-5 of our original brief and at pp. 2-5 of the petition for certiorari. Respondents' claim that this Court cannot decide these questions ignores the rules of this court which provide that the issues shall be those presented as questions in the petition for certiorari. Respondents' present attempt (Br. p. 3) to remove these questions from consideration by their own limitation on the grant of the writ is, to say the least, gratuitous. Respondents have not argued or answered in their brief questions 1, 3, 4, 7, 8, 9, and 10 set forth at pp. 3-5 of our original brief.

CONTRA-STATEMENT OF THE CASE.

We will not attempt here any restatement of the facts in this case since we have made a full and complete statement in our original brief. Nor shall we now attempt a sentence by sentence reply to the many inaccuracies and misleading contentions in respondents' statement of the case. All we attempt here is to point out the more glaring misstatements of fact which have no support in the record. As far as we can, we will follow the respondents' order of presentation in their Statement of the Case.

(a) History of the Pools.

At p. 4 of their brief, it is claimed that Zenith charged at p. 101 of its brief that the Hazeltine companies are among the largest electronic companies in the world. What Zenith actually said was:

> "This case involves the activities of the foreign subsidiaries of the largest electronic companies in the world. They include, among others, General Electric, Westinghouse, RCA, the Philips Company of Holland, British General Electric, Electrical and Musical Industries, Standard Telephone & Cables, Telefunken, Marconi Wireless and the Hazeltine Companies." (Pet. brief, p. 101.)

As we have pointed out, these companies have an aggregate net worth of billions of dollars. (A. 91-100) They control the electronics markets of the world.

At p. 5 it is stated that Hazeltine Research, Inc. owns no foreign patents. But it was admitted that the foreign counter-parts of Hazeltine Research domestic patents were in the pools (A. 131, 145; Def. Ex. 32, A. 1127-1128) and it was stipulated that plaintiff agrees for the purposes of this litigation, plaintiff and its parent corporation are one and the same (A. 55). All of the patents of Hazeltine Corporation have been exclusively licensed to so-called patent pools in England (Def. Exs. 42-50, A. 1165-1193), Canada (A. 178-9; Def. Ex. 128, A. 1841) and Australia (Def. Ex. 116, A. 1636; Def. Ex. 184, A. 2357). Counsel for respondents now say that neither Hazeltine Research nor Hazeltine Corporation has ever been a member of the pools. However, L. B. Dodds, respondents' trial counsel, testified (A. 178-9):

> "Q. You knew something was going on in the way of an attack of American companies against the pool, didn't you?

"A. Yes.
"Q. You had known that for a long time?
"A. Yes.
"Q. You still stayed in the pool?
"A. Most definitely—and we intend to continue to stay in the pool."

Dodds further said (A. 130):

"There are now and there have been for more than thirty years general industry wide patent pools in Canada, Australia and Great Britain."

After that admission the following colloquy between Court and counsel occurred (A. 131):

"The Court: You say that Hazeltine is not in any pool there. Let me ask you this, are any of the counterparts of the American patents in the pool?
"Mr. Dodds: Yes they are.
"The Court: All right, that answers my question.
"Mr. Dodds: Yes, they are.
"The Court: All right."

It was proved that respondents joined the Canadian pool over 25 years ago by placing their patents in the pool under written agreements which prevented these patents from being licensed except by the pool and except under the restriction that such patents could not be licensed for the import of electronic products into Canada (Def. Ex. 150; A. 2013; Pl. Ex. 50-A; A. 2811, 2828-30). In England, respondents' patents were licensed to the pool until 1964 under restrictions against using them to license importation into England. (Def. Ex. 58; A. 1248, 1251, 1258; Def. Ex. 60; A. 1272; Def. Ex. 70-71; A. 1380-1401). And, for over 35 years, respondents' patents were put into the Australian pools (Def. Exs. 188-195; A. 2381-2475) under the same restriction against competition and import (Def. Ex. 197; A. 2482, 2483; Def. Ex.'s 188-195; A. 2381-2475). The claim now made that the licensing of imports

was permitted in later years was found by the trial court to be false (Finding XXXIV; p. 54 of Pet. for Certiorari), and we show specifically at pp. 21-24 of this brief that this claim is still false.

Respondents knew the effect of these restrictions were to throttle commerce with foreign markets as shown by Defendant's Exhibit 115, (A. 1634) as follows:

> "We have always told our licensees in the United States that, while we could guarantee them no protection on their exports to foreign countries, as a matter of policy we would not collect a second royalty on sets exported to foreign countries where Hazeltine had complete control of its patent situation. *In those countries where the Hazeltine patents are included in any industry-wide pool they are, of course, beyond our control and our licensees have to make their own arrangements with such pool.*" (Italics ours.)

As we have pointed out at great length in our original brief, the only arrangement possible with the pools was to build a local factory and manufacture the sets in the foreign country; thus ending any foreign commerce between the United States and such foreign market.

The trial court found (A. 2903) in Finding XXV:

> "The patent pool existing in Canada is called Canadian Radio Patents Limited. This organization was formed in 1926 by the General Electric Company of the United States through its subsidiary, Canadian General Electric Company and by Westinghouse, through its subsidiary,—Canadian Westinghouse. The shareholders of Canadian Radio Patents Limited are Canadian General Electric, Canadian Westinghouse, Standard Radio Mfg. Corp., Ltd., the Canadian subsidiary of Philips of Holland, Canadian Marconi and Northern Electric (an affiliate of AT&T and Western Electric). The Pool has been largely made up of Canadian manufacturers, (most of which are subsidiaries of American companies) who were and are competitors of Zenith with respect

to sales sought to be made in Canada. The Pool, for many years, has had the exclusive right to sub-license not only the patents of the member companies but also the patents of Hazeltine, RCA and a number of other foreign companies. Since 1943 Hazeltine has been an active participant in the activities of the Pool and has been receiving a substantial share of its profits. The Hazeltine patents go into the Pool pursuant to an exclusive license agreement between Hazeltine and Canadian Radio Patents Limited, which grants to the Pool the right to include Hazeltine's Canadian patents, present and future, in its licensing and litigation activities. This arrangement has been extended to a date beyond the filing of the instant counterclaim."

(b) The Pleadings.

It is stated, at p. 6 of respondents' brief, that the patent misuse pleaded "was based solely upon Hazeltine Research's alleged package licensing of its United States patents." However, paragraph 13 of the answer (A. 18) stated:

"Plaintiff has entered into international agreements and cartel arrangements with domestic and foreign companies constituting a combination and conspiracy in restraint of trade between the United States, on the one hand, and Canada and other countries of the world, on the other hand, in violation of the Sherman Act. (United States Code, Title 15, Sects. 1 and 2.) Pursuant to such agreements, combination and conspiracy, plaintiff and its co-conspirators have set up pools of patents in Canada, Great Britain and Australia, countries in continental Europe, and other areas foreign to the United States, for the purpose and with the effect of unlawfully dividing the market areas of the world into exclusive territories parceled out among the conspirators, controlling the manufacture, use, and sale of radio and television apparatus in such foreign countries, and preventing the importation of said ap-

paratus into such countries, from the United States by defendant and other United States manufacturers not parties to the conspiracy."

Paragraphs 12 and 13 of the Petitioner's answer in the patent suit set up the licensing of respondents' patents under the illegal restrictions of foreign pools as a defense to the assertion of the patents against petitioner under the doctrine of "unclean hands" (A. 19).

The trial court concluded (A. 2910) in Conclusion No. VII:

> "The defense of misuse asserted by defendant is a valid one."

The court further concluded (Conclusion X):

> "The combinations represented by the patent pools in Canada; England and Australia had as their express purpose the prevention of importation into those markets of radio and television apparatus made in the United States and other countries. Hazeltine knowing of the restrictions against imports imposed by those Pools, nevertheless chose to permit its patents to be used in furtherance of the scheme and thereby obtained a substantial share of the pool's income. It thereby became a co-conspirator and legally liable for all the acts of the Pool and its members performed in furtherance of their patent licensing plan to divide markets and prevent competition from imported sets.' (A. 2910, 2911).

It is therefore obvious that putting respondents' patents into the illegal pools was a misuse of the patents and was properly pleaded as such.

Parenthetically, it is argued throughout respondents' briefs that since the trial court adopted the findings submitted by petitioner rather than the findings submitted by respondents that therefore such findings are not within the application of Rule 52(a) of the Federal Rules of Civil Procedure.

The Court of Appeals for the 7th Circuit in the case of *Milwaukee Towne Corp.* v. *Loew's Inc.*, 190 F. 2d 561, 564-5 (7th Cir. 1951) disposed of this contention as follows:

> "* * * [w]e must keep in mind that under Federal Rules of Civil Procedure Rule 52 (a), 28 U. S. C. A. as universally interpreted and applied we are bound to accept the findings of fact made by the district court unless clearly erroneous. And *we are not impressed, and certainly not convinced, that the application of that rule should be weakened or emasculated from the fact that the court adopted as its findings those proposed by the plaintiff rather than those proposed by the defendant.*" (Italics ours.)

However, in the instant case the Court also entered its own order and opinion as follows (A. 2857):

> "The court has reviewed the evidence, exhibits and briefs of the parties in both the patent and antitrust phases of the above cause and finds for the defendants on the issues raised by the complaint and answer and the counterclaim."

Respondents at page 7 of their brief argue that because Zenith had not filed its counterclaim for damages on April 7, 1960, the day its answer was due, that therefore there is no merit in its counterclaim. The trial court found that Zenith had no claim for damages in England prior to June 8, 1960 and no claim for damages in Australia prior to April 1, 1960 (A. 3525). The counterclaim asked for four years of damages and was filed within the time such four years of damages accrued. The antitrust act itself permits the filing of treble damage claims for the damages accruing within the four year period of limitations. Therefore there can be no merit in the contention that Zenith should have filed its counterclaim before its cause of action for four years of damages had accrued in England and Australia.

At page 7 of respondent's brief an argument is made that petitioner was not claiming damages caused by the

patent pools even though it appears from the face of the counterclaim itself, that petitioner asked for damages caused by the Pools to Zenith export business in the three markets involved (A. 64-69). Further, respondents would have this Court ignore the Motion for Leave to File a Counterclaim signed by Zenith's counsel stating (A. 62):

> "Said counterclaim arises out of the matters set forth in Paragraphs 12-13 of defendant's answer herein *and* current related unlawful activities of plaintiff occurring since the filing of the answer which activities are the proximate cause of present and continuing damage to defendant sustained after the filing of the answer."

(c) Antitrust Findings and Competency of the Proofs.

At p. 10 of the respondents' brief, it is stated that the findings contain no statement that Zenith attempted to obtain a license to import into Australia from the Australian pool. The findings however show that such a license was, at all material times, unavailable. See Finding XXXIV (A. 290?) which provides *inter alia*:

> "* * * A standard pool license imposes the restrictions necessary to effectuate the division of territories involved in the overall arrangements. It requires the licensee to agree not to export or import or sell or offer for sale in Australia any radio or television receiving apparatus not manufactured in Australia. Hazeltine has been fully aware of the Pool's plan and policy not to license for importation and has cooperated with and approved the operation of the Pool with respect to all the Hazeltine Australian patents."

It is next stated, respondents' brief, page 10, that the evidence offered by Zenith as to the Pools, which implemented the conspiracy, consisted largely of numerous "ancient" documents marked as deposition exhibits in a previous case.

An examination of the record will disclose that the reason

these documents were "ancient" is because they relate to the time the conspiracies were formed and while evidence of the illegal activities of the pools was still available for a subpoena. These documents evidenced the formation and participation of the respondents and their co-conspirators in the pools. The evidence was admitted pursuant to a pre-trial stipulation which admitted its competence (A. 72-90).

Apparently respondents' present contention is if they have maintained a conspiracy long enough, evidence of its inception loses any probative value. This is not a new contention and has been used in much of the antitrust litigation of the past forty years.

Further, respondents themselves put into evidence the settlement papers of the previous Zenith-RCA case in which three of Hazeltine's co-conspirators paid Zenith ten million dollars for damages accruing up to October, 1957. This is the same conspiracy which Hazeltine now contends and the Court of Appeals has held could not, as a matter of law, cause Zenith's Canadian business any damage whatsoever.

The Court of Appeals holds that the evidence of this settlement has no probative value on the issue of the "fact of damage" even though it was an admission made by Hazeltine's co-conspirators made in the course of the conspiracy in an effort to keep their Canadian patent pool alive and get it out from under the formidable legal attack of the Zenith counterclaim in the RCA suit. The Court of Appeals holds it incompetent on the ground that evidence of settlements is not admissible. Here, no question of admissibility is present because respondents put the evidence in the record as their own exhibits (A. 466; Pl. Ex. 48, A. 2783, 2785-6).

It is next stated that Zenith has wrongfully interpreted

the license agreements showing restrictions against imports in the three markets involved. The trial court, after studying the documents in evidence found:

Finding XXVI:

> "The organization, purposes, and functions of the Canadian pool are, in principle, identical to those of the English pool. Approximately 5,000 patents are amassed for licensing *and the only form of license available is strictly limited to manufacture in Canada.* . . ." (A. 2903-2904.) (Italics ours.)

In Finding XVI with reference to the English pool, the trial court found:

> "* * * Each of the participating parties in all of the interrelated agreements, including Hazeltine by virtue of the exclusivity of its joint agreements with General Electric Co. Ltd. contractually pledged that during the period of the agreements no license would be issued that would permit the export of radio and television receivers from the United States into the British market, and that the only license employed by the pool would be a standard package license limited to local manufacture." (A. 2900.)

At p. 11 of respondents' brief, the testimony of Wright, Zenith's president, and Kaplan, its executive vice president is cavalierly disposed of with a statement that respondents will show that the testimony was discredited and destroyed. How it was destroyed is not shown because no witness denied it (A. 452) and after further extensive hearings conducted by the respondents' present counsel the trial court said, after hearing everything respondents had to offer, that his decision would be the same as it had previously been on the conspiracy and the "fact of damage" issues, which issues were supported by the Wright-Kaplan testimony (A. 3524). The trial court went on to say:

> "There could be no question in my mind that Zenith

> suffered damages during the damage period by virtue of the pools which I have found and reiterate existed at the time of the damage period. * * * And, as I have indicated, there is no question they lost money by virtue of the pools excluding them." (A. 3524-5.)

If these remarks constitute impeachment of undenied testimony then a new rule of impeachment for the Federal court has been established by the respondents. Up to now the only way to impeach a witness has been by showing that testimony on a material fact, as distinguished from opinion testimony, is false. Nothing remotely resembling impeachment of the Wright and Kaplan testimony has been presented on this record. Further, this claim that the witnesses are impeached because the trial court cut down the amount of damages estimated by the Wright and Kaplan testimony as to England and Australia would mean that every time a court failed to allow all the damages claimed that therefore the witnesses were impeached.

Further, the Kaplan and Wright testimony as to Canada was adopted completely by the trial court's findings and was corroborated by Zenith's operations and profits in Canada when protected by the trial court's injunction against the pools. We have pointed this out in our main brief at p. 83.

It is next claimed, at page 11 of respondent's brief, that Zenith claimed damages only on a "mature market" or "established market" theory. No one ever heard of such a theory until a year after the case was tried when respondents' present counsel injected it by way of motion to rehear the case (A. 1942).

At p. 13 and throughout their brief respondents utilize offers of proof as if they were part of the present record and discuss at length proceedings occurring a year after the trial of this case. The only relevance these proceedings have here is that as a result of the subsequent

proceedings the damage findings were modified as to amount in England and Australia but affirmed as to the issue of the "fact of damage" in Canada, Australia and England (A. 3038-3039; 3524-3527).

The respondents' post trial motions asked the trial court to withdraw its findings of fact and conclusions of law and to dismiss the counterclaim as not proven or provide for further pleading, discovery and proof (A. 2939, 2950-2951). Respondents advanced three grounds in support of this motion.

As a first ground, respondents charged that L. B. Dodds, respondents' counsel, had been surprised by an alleged variance. The trial court disposed of this contention as follows:

> "I think the pre-trial briefs show that he [Dodds] wasn't suddenly confronted with this, because the pre-trial briefs were filed many months before trial and indicated to Mr. Dodds what the theory of the complaint was." Court of Appeals, App. 1865.*

As a second ground, Hazeltine sought to assert the Statute of Limitations a year after the case was tried (A. 3033) and to plead the release of the Zenith-RCA litigation in 1957 long after the case had been submitted for decision. The trial court permitted the filing of the pleas as of a date a year after the trial (A. 3037), and then promptly overruled the motion to dismiss the counterclaim on these grounds (A. 3037).

As a third ground, Hazeltine contended that Zenith had failed to establish the fact and amount of damage through proof adequate to sustain the judgment. This motion was overruled (A. 3037).

Hazeltine also submitted offers of additional proof in

* By stipulation (A. 4282) the Court of Appeals Appendix is made part of the record here.

support of the antitrust motion (A. 2955-2995). These included (1) proof of Zenith-RCA litigation releases, (2) proof of Zenith's annual reports for the years 1947-63, (3) proof of tariffs, taxes and other matters claimed to affect importation of television and radio sets in Australia, Canada and England, and (4) proof of changes alleged to be necessary to adapt American television sets in Australia and England to a different broadcasting system. After hearing, the trial court ruled that no change would be made in the damage finding with respect to Canada and directed Zenith to prepare and submit a judgment for damages in Canada and for injunctive relief in the three markets (A. 3038-39). The trial court had permitted the case to be reopened for the sole and limited purpose of determining whether an embargo existed in Australia and England which would have prevented Zenith from establishing a market for its radio and television sets *prior* to the beginning of the four year damage period (A. 3087).

At pp. 19-25 of respondents' brief an attempt is made to re-argue factual questions in the trial court's damage findings. As we point out at page 48 of this brief, the only question open for review in the court below was whether the exhibit showing the amount of damages was legally sufficient so that the trial court would be permitted to base its findings on the exhibit. Exhibits 218 and 220, which show the computation of the amount of damage, were not denied and their accuracy was admitted (A. 324; 716-64; 2661).

At page 21 of respondents' brief counsel try to make it appear that the trial court found the testimony of Wright, the Zenith president, and Kaplan, the Zenith vice-president, as to an estimated possible market share in England and Australia to be perjury. The court properly treated this estimate testimony as "expert testimony" and said it was "not bound by the fact that the evidence is uncontroverted

and undenied." The court's remarks had nothing to do with the testimony of these witnesses as to material facts on the issues of the case. Even in the evidence of the estimate of market share in England and Australia, the court was careful to point out that the differences between his view and that of the witnesses did not reflect on their good faith or integrity but arose only because "the Court is aware of the pride of officers in their corporation, and the belief in their product, * * *" (A. 3525-6).

However, the trial court is the sole judge as to the credibility of witnesses, and the weight of the evidence; obviously the trial court did not attach any credence to the arguments of counsel that Wright and Kaplan were attempting to mislead him because after all the evidence in the second hearing had been heard, the trial court reaffirmed his finding as to the damages in Canada which were in large part based on the Wright and Kaplan testimony (A. 3037).

At p. 27 respondents in their brief say, "Zenith took no appeal from the rulings of the court that governmental import restrictions found to exist in England and Australia and nothing else had kept Zenith out of those countries." From this statement one might believe that the court had held that the pools did not keep Zenith out of these markets after the governmental restrictions were removed. These restrictions were removed in England on June 8, 1959 and in Australia on July 1, 1960. The trial court allowed damages after these dates and pointed out that as soon as the government restrictions were removed, the pool restrictions against imports were again imposed to the damage of Zenith (A. 3539). The court said on this specific question (A. 3524-5) "There could be no question in my mind that Zenith suffered damages during the damage period by virtue of the pools which I have found, and reit-

erate, existed at the time of the damage period. * * * And as I have indicated, there is no question they lost money by virtue of the pool's excluding them." (A. 3525.)

(d) The Appeal.

(Answering pp. 28-29 of Respondents' Brief.)

The respondents, in an attempt to limit this court's disposition of the questions presented in the petition for certiorari say contrary to the opinion of the Court of Appeals that the court below did not rule on the illegality of the pools or on any other question except the "fact of damage" and that the sole issue is whether the Court of Appeals erred in concluding on the entire record that the trial court's Finding that Zenith was damaged "was clearly erroneous."

The Court of Appeals in its opinion stated "the district court concluded that the alleged conspiracies had, as their express purpose, prevention of importation of TV apparatus made in the United States, that HRI, by participating in the conspiracies had violated the Sherman Act, and that Zenith had established that it had been injured in its business as a result of the unlawful activities of the pool." The Court of Appeals reversed the finding that the foreign commerce of Zenith had been drastically curtailed by the patent pools but did not, in any way, modify or change the finding of the illegal conspiracy.

Under decisions of this Court, to which we will later refer in this brief, in order to determine whether or not on the entire record the trial court's finding that Zenith was damaged "was clearly erroneous" the court must determine the nature and intendment of the Pools and whether or not they are illegal under the Federal anti-trust law.

(e) The Facts as to England.

(Answering pp. 29-47 of Respondents' Brief.)

The proofs as to the English conspiracy are set forth at pp. 29-35 of our original brief and need not be repeated here. It is established on this record that it was not possible to export Zenith sets into England during the periods starting with the war and ending in June 1959 because of import restrictions. However, these restrictions were repealed June 8, 1959. Respondents now say that proofs prior to the government restrictions are not available to petitioner because they are too "ancient". These proofs were documentary and admitted without objection. The same contention was made in the *Continental Ore* case referred to later in this brief which case is discussed at page 41 of this brief.

It is true, as stated in respondents' brief at page 36, that Zenith made no effort to sell television sets in England after June 8, 1959. This was because of the patent pool and its obvious and inherent threat to sue Zenith and its customers had it attempted to sell television sets without patent protection in England (A. 464). Respondents' contention, that since Zenith therefore stayed out of the market it could not be injured, is a complete *non sequitor*. It ignores the fact that the pool was organized to prevent imports by the inherent threat of infringement suits on massed television patents against a company such as Zenith which was solvent and able to respond in damages. Since the threat succeeded it must follow that Zenith was injured because except for patent protection it was certainly equipped to compete in the English market. Wright, Zenith's president, testified specifically that the threat of suit by the pool kept Zenith out of England during the entire damage period (A. 464). As we have pointed out in our original brief at p. 61, even though we should admit arguendo that some other

factors contributed in keeping Zenith out of the English market Zenith could still hold the Pool legally liable for its damages in having been deprived of a television market in England.

The contention made about 405 and 625 line systems of television receivers, made at page 35 of respondents' brief, is answered at pp. 86-88 of our original brief and that answer need not be repeated here. Also, the argument advanced at page 40 of respondents' brief that the reason Zenith did not ship television sets to England was because it was waiting for a change to the 625-line CCIR system is nothing but a contention by counsel. *Zenith did not ship any sets after the change was made.* Wright testified that the reason they were not shipped was the threat of suit by the Pool (A. 464).

At p. 45 of respondents' brief it is claimed that the English pool permitted imports under the extension agreement of the pool from July 1, 1960 to June 30, 1964. That statement is false.

It is argued that the deletion of paragraph 7 (A. 1258) of the 1957 pool agreement by the extension agreement permitted the licensing of imported products. However, Clause 11 (g) of the prior pool agreement was amended by the extension agreement, as follows (A. 1275):

> "Clause (11g) shall be read as if the following words, 'Provided, however, that no variations shall be made in the terms and conditions of said license A8S and A8T without the unanimous consent of the parties hereto except the British Thomson-Houston Co., Ltd. as at the 30th of June, 1960. Subject as aforesaid . . .' were inserted after the words 'majority decisions' in line 7 of that clause."

The extension agreement extending the pool until 1964 also provided that Clause 11 (b) of the prior pool agreement

shall read that licenses issued by the pool "... shall be in the form of License A8S and License A8T attached hereto (or in such other form as may be agreed by the parties hereto as hereinafter provided) and each of the parties hereto agree to accept licenses in such form in the event that it or any of its subsidiaries is engaged in the manufacture and/or sale of radio apparatus" (A. 1274).

The A8S and A8T licenses ran from July 1, 1960 to June 30, 1964, a date subsequent to the trial of this case. By their terms the above licenses were limited to products manufactured in Great Britain, Northern Ireland, the Channel Islands and the Isle of Man (A. 1382; Def. Ex. 70). The A8S license also provided that it was a personal, non-exclusive, non-assignable license "for the purpose of manufacturing broadcast sound receivers within Great Britain, Northern Ireland, the Channel Islands and the Isle of Man (hereinafter called the territories) and using, selling or letting for hire such broadcast sound receivers so manufactured hereunder." (A. 1382)

The A8T license had the same provisions (A. 1393-94). The net result of all of this was that while the clause expressly prohibiting the licensing of imports was deleted, the same thing was accomplished by the agreement of the pool members not to issue any license except by an attached form of license; limited by its terms for the purpose of manufacturing products within Great Britain, the Channel Islands and the Isle of Man.

It is further argued that adding the words "or for imports of such apparatus" to paragraph 18 of the extension agreement constituted a blanket authorization to issue individual licenses to import. The language is not susceptible to that construction. The language did not change the agreement not to grant individual licenses except in the case of apparatus covered by Clause 11(c) (i) and (ii) and Recital 3 of the agreement.

Clause 11(c) (i) and (ii) provides (A. 1261) "each of the parties hereto reserves the right to grant licenses separately under all or any of its own patents or patent rights in the following cases, namely:

(i) in cases where the principal consideration is not the payment of royalties or commercial arrangements in relation to the supply, purchase or sale of goods and

(ii) in cases in which and to the extent that they respectively are or may be obliged to grant licenses for television receivers by virtue of their now existing or future commitments to the BBC or to the postmaster general with regard to television."

Section 18 again states that no individual member of the pool can license at all "except in accordance with the decision of the committee". (A. 1267)

The only other apparatus mentioned as being excepted from the restriction against importation is under Recital 3rd which refers to "stocks on hand at the expiration of the A6 license" and products covered by license to the British Thomson-Houston Company. (A. 1251). This excepts British Thomson-Houston from the restriction against imports but that company was always excepted from the restrictive provisions of the agreement against imports (A. 1272). It was further provided in the A8S and A8T licenses that the form of the license could only be changed by unanimous consent of the parties thereto (A. 1275). This made the conspiracy more binding than it was in the previous agreement which permitted alteration of the licenses by "majority decision." (A. 1262)

So we see that the respondents' argument that the conspiracy against imports was ended by the above clauses is a dishonest argument which falls of its own weight. This is the same sort of tenuous contention used with reference to the Australian pool. All it proves is that the

pool members apparently realizing their vulnerable legal position took the more obvious evidence of their illegal restrictions against imports out of the agreements and then put them right back in in a more subtle way. These agreements and restrictions against import by the members of the pool constitute a conspiracy of companies who would have been competitors of Zenith in the sale of its T. V. sets if it could have imported its product into the English market past the restrictions of the pool.

Respondents would have this court hold as a matter of law that this is a court sanctioned way to end an illegal conspiracy under our antitrust laws. In determining that issue we submit that the court should view the 1960 extension of the Pool against the background of evidence of a restrictive conspiracy that had exercised control over an entire market for more than a quarter of a century.

At p. 46 respondents claim that Zenith could not be damaged in its radio business because the Pools' radio patents had already expired. However, Zenith officers testified (A. 472) that proper distribution of radios could not be obtained in England without the right to distribute a full line of products which included television sets. The export of television sets was, as we have pointed out, blocked by the pool.

(f) The Facts as to Canada.

The facts as to the Canadian pool are set forth at length at pp. 7-25 of our main brief and need not be repeated here. Not one of these facts was denied in the court below or in the trial court or here. While counsel for Zenith has been accused of distorting the record not one of our record references to the Canadian conspiracy proofs is challenged in any way. Further, the respondents ignore their own evidence when they say at page 152 of their

brief that they are not in the pool. That respondents had no defense to the conspiracy proofs in Canada is admitted. At page 152 of their brief they say: "It is true that CRPL had a policy of not licensing imports."

The most conclusive piece of conspiracy evidence in the entire case was put into the record by the respondents themselves (A. 2812-2829). This was plaintiff's exhibit 50A. While it is conclusive on the conspiracy issue the first mention respondents make of it is at p. 105 of their brief and the Court of Appeals did not even mention it in its opinion. However, since respondents sponsored it as evidence and filed no countervailing evidence it proved the entire Canadian conspiracy as it existed in 1959 during the damage period. This document recites:

> "Canadian Radio Patents Limited (hereinafter called CRPL) was incorporated in 1926 for the purpose of acting as a patent licensing agency. At the time of the presentation of its brief to this Commission it acted as the central patent licensing agency in the administration of patent rights in the radio, television and general electronics fields in respect of patents owned by its then five shareholders:
>
> > Canadian General Electric Company, Canadian Westinghouse Company, Northern Electric Company, Canadian Marconi Company and Canadian Radio Manufacturing Company.
>
> It also acted as licensing agent in Canada for RCA Victor Company *and Hazeltine Electronics Corporation*. . . .
>
> • • • • •
>
> *"The portfolio in respect of which CRPL had the right to grant licenses consisted of 5,000 patents, and in the absence of a license from CRPL it is doubtful if anyone could sell in Canada a radio or television receiver.*
>
> "CRPL indicated that it does not grant a license to any importer of radio or television receivers, except

in the limited situation where the type or kind of radio or television receiver sought to be imported *is not manufactured by any radio or television receiver manufacturer in Canada. It is particularly in respect of the policy of CRPL in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission.*

"It was stated to be the policy of CRPL to enforce its patent rights against any person who sells in Canada an imported radio or television receiver which infringes any one or more of the patents in its portfolio . . .". (Italics ours.)

It is now claimed that Zenith was fully licensed in Canada and therefore could not be intimidated by any threat by the Pool of infringement of any patents administered by Canadian Radio Patents, Ltd. However, on July 30, 1958 two years after the settlement of the RCA case, McConnell, the pool manager, called on the Zenith Canadian subsidiary in Toronto, Canada and told Mr. Floyd Kiely, its general manager "that even though patent licenses covering imports had been obtained by Zenith from RCA, General Electric and Western Electric as a result of the RCA-Zenith litigation, the pool had many other patents and no license permitting import would be granted by the pool (defendant's exhibits 151-152, A. 2014-18). Thereafter, in a conference with Zenith's vice-president Frank Crotty on May 12, 1959 (Def. Ex. 154, A. 2021) McConnell told Crotty that Zenith was infringing some of the pool patents "one of which was a patent of Hazeltine origin. He told me that I would have to take the license; that the license could not be for importation, it would have to be for local manufacture." (A. 410.)

For obvious reasons, the respondents did not bring McConnell to the trial as a witness to deny the conversation. No denial is found in this record.

The settlement in 1957 expressly excluded color TV pat-

ents from its terms and only included licenses on patents issued prior to September 1, 1957 owned by the three companies involved (Pl. Ex. 43, A. 2783-4). Obviously many patents held by the pool were not affected by the settlement.

At pp. 49-55 of their brief, respondents attempt to show that the evidence of damage to Zenith's business was old and that nothing happened after the settlement. The evidence of what happened after the settlement is discussed at length at pp. 20-25 of our original brief and is argued at length at pp. 62-76 of that brief and no good purpose would be served by repeating it here.

One glaring misstatement on this issue is made at p. 50 of respondents' brief. There the statement is made that: "To show interference by suits or threats of suits against Zenith dealers or distributors in Canada, Zenith introduced into evidence correspondence dated in 1951, and in 1954. But there is no similar evidence of any threat against a Zenith distributor or dealer after the Zenith-RCA settlement."

The testimony was undenied that because of the activity of the pool Zenith could not obtain any distributors except in Western Canada (A. 456). For this reason, Zenith was forced to use its Canadian hearing aid distributor as a television distributor (A. 456). In 1959 and within the damage period, McConnell, the pool manager in Canada, threatened suit against Zenith's distributor on a Hazeltine patent and served notice of infringement of a Canadian Patent No. 562,773 because of the use of such patent in Zenith television receivers (A. 2019, 2020, 2021).

This threat was received by Zenith within the damage period (A. 2021).

Shortly thereafter the instant suit was started by respondents, who were in the conspiracy at that time, on a patent whose counterpart was in the Canadian pool (A. 131; 272).

Documentary evidence proves that Hazeltine had been used before as the "catspaw" of the pool in bringing suit against alleged infringers of pool patents used in imported sets. See defendant's exhibit 142 (A. 1964, 1967-8) which states:

> "* * * the operations of CRPL are of very substantial benefit to the industry as a whole and to all the shareholders, if for no other reason than the threat against dumping."
>
> "Recently a writ was issued against Faucher Electric of Montreal for selling imported Dumont sets. The plaintiffs were CGE, CRPL *and Hazeltine.*" (Italics ours.)

It is further argued at p. 51 of respondents' brief that there were only two incidents after September 7, 1957, showing restrictive activity of the Pool and neither had any effect on Zenith's sales in Canada. This argument is answered at pp. 63-76 of our original brief. However, in passing, it should be noted that the pool and Hazeltine's participation therein continued during the entire damage period and the effect of the pool's activities was continuous and cumulative and its prior activities carried forward into the damage period just as much and with just as great a threat to and effect on Zenith's potential dealers and customers as if we had introduced separate proofs of such activities for each day of the damage period. As Mr. Wright, Zenith's president, testified, the pool's activities were well known, having been publicized to the trade continually by the CRPL warning notices (A. 452). The pool itself advised the trade; "newspapers from coast to coast carry the tremendous total of 4,343,084 advertising messages to help put a stop to importation of cheap, substandard imported radios." (A. 1863.) As soon as it is perceived that the court is dealing with a continuing and "cumulative" conspiracy to stop imports, its impact on the market is seen as obvious.

At pp. 55-62 of respondents' brief, there is a long discussion of Zenith's annual reports. These, while available to respondents at the time of the trial, being public records, are not in evidence in this case. They were submitted as offers of proof a year after the trial of the case (A. 2956-95) and their use attempted here is the same as that in the court below; namely, to have them considered as if in evidence in the case and as a basis for an argument against the trial court's findings. Even though they did not constitute newly discovered evidence and their submission as an offer of proof was rejected by the trial court (A. 3037-38) they are treated here as if they were part of the record in this case. The trial court's comment on these annual reports as an offer of proof was apt. He stated "there is no obligation to cry on the stockholders shoulders." (Ct. of Appeals App. 1905.)

At page 105 respondents attempt to impeach the testimony of Joseph Wright, Zenith's president with Zenith's annual reports from 1958 through 1962—which are not in evidence at all. See footnote respondents' brief p. 105.

At page 113 respondents complain that the trial court refused to consider these reports *which were not in evidence.* This is probably the most unique complaint ever advanced in a lawsuit. However respondents now exceed themselves and say at p. 113 that this court acting as a trial court should impeach the Wright testimony with those documents *which are not in evidence* and then for that reason affirm the holding of the court below that there is clear error in the Findings. This has to be the most ridiculous contention ever advanced in defense of an anti-trust suit.

At p. 60 it is asserted that there is no evidence of a causal connection between the instant suit and the pool. However, that causal connection was expressly admitted by respondents' trial counsel in his opening statement in speaking of the way the Pool could prevent imports (A.

131-2). This statement was as follows: "These pools don't have any power to keep out anything. * * * All it means is that if you import goods into Great Britain or Canada or Australia, and if what you are importing are infringements of the patents they administer, you may subject yourself to an infringement suit, the same as if you infringed a patent in this country. *And we can't prevent Zenith from selling sets without an adjudication, which we are in the process of trying to get now.*"

At p. 61 it is claimed that the issue of the amount of petitioner's damages is not before this court, even though it is now claimed that there is no damage of any kind shown by this record. This is one of the questions for review which was set forth in the petition for certiorari granted by this court.

Rule 23 (1) (c) of this court's rules provides *inter alia* "* * * The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

Question 5 in the petition for certiorari is as follows:

> "Whether the uncontradicted testimony of Zenith's officers, based on personal knowledge of business conditions and concerning the volume of business which Zenith would have done in Canada, England and Australia absent the unlawful interference of the pools constitutes substantial evidence within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure in support of the District Court's damage findings."

This issue is discussed at length at pp. 77-84 of our original brief and at pages 14-15 of this brief. The present claim that petitioner's exhibit 220 was not competent on the issue because it assumed "a mature market" is an afterthought by respondents' counsel. The exhibit was introduced with-

out objection (A. 769) and there is no countervailing evidence of the amount of damage by opinion evidence or otherwise in this record.

(g) The Facts as to Australia.

It is asserted that Zenith made no claim that the Australian pool refused to grant it a license. We have shown at pp. 91-96 of our original brief that such a license demand was not necessary because a license to import in Australia was never available because of the conspiracy.

It is now asserted that the testimony introduced by Zenith "'as to the Australian pool was indeed sparse." However, it all came out of Hazeltine's files (A. 58, 399) and was admitted in evidence either without objection or included in a pre-trial stipulation (A. 72) and it shows without denial an illegal patent pool which has been in existence for over 35 years (Def. Exs. 180-195, A. 2305-2475).

No evidence was introduced by respondents that a license to import was available or would have been granted by the Pool to Zenith, if requested.

It is claimed here, and was claimed in the Court below, that the license agreements themselves evidenced no restrictions against imports. We have shown that this argument is completely without merit at pp. 89-90 of our original brief. It is the same sort of argument now made for the first time with reference to the English pool which we answer at pp. 21-24 of this brief. The trial court heard it and rejected it by refusing to set aside its findings of conspiracy in the Australian market (A. 3038).

Finally, it is claimed that government statistics affirmatively disprove the contention that exports were kept out of Australia by the Pools (Pet. Br. p. 138).

However, the Pool in its entire history has never granted a license to import American sets into Australia (Def. Exs. 188-195, A. 2381-2476; Def. Ex. 197, A. 2482). The import statistics referred to by respondents actually corroborate this. Thus during the damage period only 53 American made sets were imported into Australia (A. 3399).

(h) The Patent Misuse Defense.

It was argued in the answer to our petition for certiorari that this issue is moot. In our reply we pointed out that it could not be moot because it was made a basis for the treble damage judgment and because four other black and white patents were asserted, along with nine color-television patents, under the same conditions found by the trial court to constitute misuse. Further, the injunction entered by the trial court which protected Zenith from misuse of respondents' patents under the antitrust laws by enjoining the foreign patent pools; was modified by the court below by striking out such protection from the injunction decree and the question of whether this is legally justified has been accepted for determination by this Court by its grant of certiorari.

ARGUMENT.

I.

THE DECISION OF THE COURT OF APPEALS THAT THE PETITIONER'S FOREIGN BUSINESS IS NOT ENTITLED TO PROTECTION UNDER FEDERAL ANTITRUST LAWS FROM INJURY BY FOREIGN PATENT POOLS JOINED IN BY RESPONDENTS IS ERRONEOUS AND MUST BE REVERSED BY THIS COURT IF THE APPLICATION OF SUCH LAWS TO FOREIGN COMMERCE IS NOT TO BE NULLIFIED.

Any fair view of the record evidence, viewed as a whole and not cut up into fragments or bits and pieces, must lead to the conclusion that the court below has ruled that the undenied facts showing illegal conspiracies to stop foreign commerce cannot constitute injury as a matter of law to an American company equipped to compete in the three markets involved. The result of such a ruling is to state by judicial decree to the foreign patent pools that they have complete immunity under the Federal antitrust laws to stop all foreign trade between the United States and such markets by the illegal use of pooled patents so long as they follow the script shown by the undenied evidence in this record. The net of respondents' position here and below is that they are immune from the application of the antitrust laws on the ground that they are entitled to join foreign patent pools with impunity even though they admit, "There are certain restrictions on importation they impose, * * *", because it is to their advantage both financially and in enforcement of their patents to do so (A. 403, 408, 409).

In the trial court respondents' then counsel, as shown

by the following colloquy, exercised complete candor in stating respondents' position (A. 409):

> "The Court: I assume, Mr. Diggins, that prior to putting Hazeltine's patents in the Canadian Pool, Hazeltine was aware of the fact that the Pool was not going to permit the importation of American merchandise and, knowing that, put their patents in the Pool. Does that, in your opinion, make any difference?"
>
> "Mr. Diggins: Your Honor, I don't think it makes a particle of difference."
>
> The Court: (A. 408-9) I mean, why couldn't you have just retained them, and issued licenses there as you do here?
>
> Mr. Diggins: Several reasons, your Honor. In the first place, the Pool is the big licensing agency up there. Secondly, it would be quite an expensive operation to set up a policing agent, a licensing agency in Canada. If we did it in Canada, why not require us to do it in Great Britain and Australia?"

It is also argued that under the Federal antitrust laws, respondents should be immune from treble damage claims for the damage the pools create because it exceeds their ability to respond to the judgment (Br. p. 2). It would seem elementary that the question presented here is whether on the undisputed facts on this record the respondents have violated the law and as a result of the activity and restrictions of the pools which they have joined Zenith has suffered damages. Whether or not Zenith is a large or small company and whether Hazeltine companies are rich or poor are questions completely beside the point.

It should be noted that in the lower court it was contended that Hazeltine had to enter the Canadian conspiracy because "those same restrictions have to be imposed under Canadian law or else the owner of the patents is subject to forefeiture of his rights" (A. 404). That contention was found by the trial court to be false (Finding XXXII, A. 2906) and, as conceded at page 153 of respondents' brief, has now been abandoned.

(a) The Treble Damage Judgments.

It must be apparent to this court that whether or not illegal patent pools exist in all three markets involved and whether or not they prevent the export of Zenith's products to such markets are questions charged with tremendour public import because those restrictions apply not only to Zenith but to every American electronic company (Pl. Ex. 50A, A. 2830). Obviously it was to afford relief against such illegal practices that the anti-trust laws were passed by the Congress in the first place and obviously the right given by the Congress to private litigants to enforce these laws by a suit for treble damages was granted to further the public interest involved in the enforcement of these laws. See *Radovich* v. *National Football League*, 352 U. S. 445, 453-4 (1956) where this Court said:

> "Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the anti-trust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. * * *."

The record shows that the Hazeltine Companies on their foreign counterpart patents (A. 947) are receiving over one million dollars a year from these illegal pools (A. 23; Def. Ex. 32; A. 1855) and it is understandable that they are very unhappy over the prospect of the anti-trust laws being enforced against them. However, we feel sure that the invective used in their brief against Zenith and its counsel will not obscure the evidence proving the conspiracy issues and that the resulting damage therefrom is not in dispute and not denied and that the case stands in the posture of a demurrer to the evidence. This issue was first raised by motion to dismiss in the trial court (A. 2939) which that court promptly denied (A. 3037-8). In the

court below the ruling of the trial court was reversed on the same demurrer to the evidence thus testing its legal sufficiency to show the resulting damage and its amount and the threat of future damage caused by the illegal pools.

The Court of Appeals decision did not set aside the findings of fact entered by the district court and described in the Court of Appeals decision as follows (A. 4254):

> "The district Court concluded that the alleged conspiracies had as their express purpose, prevention of importation of television apparatus made in the United States; that HRI by participating in the conspiracies had violated the Sherman Act. . . ."

The witness L. B. Dodds', counsel and an official of the Hazeltine companies and who had managed the licensing of both domestic and foreign patents for respondents for a quarter of a century (A. 144) testified that his company had participated in the pools for many years and "intended to continue to stay in the pool" (A. 179). He also stated (A. 400) in colloquy with the trial court:

> "Mr. Dodds: Well, in Canada, Hazeltine itself did put the patents in the Pool by an agreement with the Canadian Radio Patents Pool."

The Court of Appeals holds that illegal pools proven by documentary evidence to be designed to stop Zenith's export business and cause damage to that business as a matter of law could not even constitute a threat to Zenith's export business under 15 U. S. C. § 26. It is obvious that while admitted and uncontradicted facts are present in the record the Court of Appeals decision that such facts do not justify an injunction or treble damage award raises a question of law under the antitrust laws which this court can resolve as a legal proposition. See *Bigelow* v. *RKO Radio Pictures, Inc., et al.*, 327 U. S. 251 (1946) and *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690 (1962).

Respondents argue at pp. 45 and 64 of their brief that documents in evidence in this case do not prove a restriction of imports into England and Australia. This issue they ask this court to decide without remand because they have to concede it was decided in their favor in the court below.

We have set forth at length in our original brief the undenied and uncontroverted testimony as to the conspiracies implemented by patent pools designed to control the entire electronics market in the respective countries. No one can seriously contend that under the decisions of this court this evidence is not legally sufficient to prove a conspiracy which violates the Federal antitrust laws.

Thus, this court held in *Interstate Circuit Inc.* v. *United States,* 306 U. S. 201, 227 (1939) that even without direct evidence of conspiracy, such as is presented here:

> "Acceptance by competitors without previous agreement of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce is sufficient to establish an unlawful conspiracy under the Sherman Act."

This court also said at p. 225 of the same opinion in referring to the right of a court to draw the inference of conspiracy "this inference was supported and strengthened when the distributors, with like unanimity, failed to tender testimony at their command of any officer or agent of a distributor who knew or was in a position to know whether in fact an agreement had been reached among them for concerted action."

Of course, in the instant case, no denial by any official was possible because the conspiracy was proved by documentary evidence and the documents were conclusive. No officer of any of the pools and no officer of respondents denied any document in the case or denied any of the conspiracy proofs. In Canada, McConnell, the pool manager,

was not produced as a witness at the trial to deny that the pool did damage Zenith or to deny that he threatened an infringement suit against Zenith or to deny that the instant suit was instituted and prosecuted by respondents as a part of the overall conspiracy to prevent Zenith from exporting sets into Canada.

It is now argued in the respondents' brief that this court cannot hold the respective patent pools violate the law because the only thing decided by the Court of Appeals was that there was no "fact of damage."

Assuming *arguendo* that the only issue decided in the treble damage counterclaim was a damage issue; to even reach that issue the Court of Appeals necessarily had to approve at least tacitly the conspiracy findings of the trial court. We have pointed out under the rules of this court "the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein."

The Court of Appeals took no issue with the trial court's findings and conclusions that the pools were formed and carried on by conspiracy and were illegal. As far as Canada is concerned; the following language from the court's opinion had to assume that an illegal patent pool was involved, otherwise the damage even if it existed was irrelevant. The Court said "Zenith's Wright's testimony with respect to the Canadian market can be considered as some slight evidence of the fact of damage."

Furthermore, as a matter of law a conspiracy of this kind cannot be dismembered into different periods of time as respondent's attempt but the evidence has to be viewed as a whole not only as to its sufficiency on the conspiracy issues but as to "the character and effect" of the conspiracy on the issue of damages as well.

As this court said in *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690, 699 (1962) cited above:

> "The character *and effect* of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." (Italics ours.)

It is apparent that in order to determine the amount of damage or the "fact of damage," the court has to view the conspiracy proofs as a whole to determine whether the trial court's Finding that the purpose of the conspiracy was to damage the petitioner by excluding its product from patent protection in the three markets involved was correct.

One of the questions presented in the petition for certiorari was whether the record shows error by the court below in vacating the injunction against the illegal pools. Whether or not the Court of Appeals erred in vacating the injunction cannot be determined without a decision by this court as to the legality of the pools which threatened Zenith's business. As we have already pointed out in our original brief, the only defense to the conspiracy issue ever attempted by respondents was that in Canada the pool was justified by the Canadian Patent Act (A. 404). That defense, while presented at length in the trial court was abandoned in the Court of Appeals and no attempt has been made to legally justify the pools either in the Court of Appeals or here.

As we have pointed out, the respondents seek to have this court ignore all the evidence of the formation and activity of the pools prior to October, 1957, the date of the settlement of the RCA-Zenith case. Such a contention was disposed of in the recent decision of *Hanover Shoe* v. *United Shoe Machine Corporation*, 20 L. Ed. 2d 1331 (1968) where this Court in a footnote said:

> "United has also advanced the argument that because the earliest impact on Hanover of United's lease-only policy occurred in 1912 Hanover's cause of action arose during that year and is now barred by the ap-

plicable Pennsylvania statute of limitations. The Court of Appeals correctly rejected United's argument in its supplementary opinion. We are not dealing with a violation which, if it occurred at all must occur within some specific and limited time span. Compare *Emich Motors Corp.* v. *General Motors Corp.* 229 F. 2d 714 (CA 7th Cir. 1956) upon which United relies. *Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accruing harm on Hanover.* Although Hanover could have sued in 1912 for the injury that United inflicted, it was equally entitled to sue in 1955." (Italics ours.)

This discloses that there is no merit in the unpleaded defenses of release and statute of limitations relied on in the court below but apparently abandoned here.

Further, this court has expressly dealt with the respondents' contention that the earlier evidence having to do with the activities of the pool cannot be disregarded on the issue of the fact of damage. In *Bigelow et al.* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 264 (1946) this court stated:

"In the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendant's wrongful acts and their tendency to injure plaintiff's business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendant's wrongful acts had caused damage to the plaintiffs."

Since it is conceded in respondent's brief that the issue of the "fact of damage" is before this court for decision it follows that to determine whether petitioner was damaged by respondents' wrongful acts this Court has to determine as part of that issue whether respondent's acts in participating in the pools were or were not wrongful. Under the decisions of this Court, the facts showing the illegal nature of the conspiracy and their tendency to damage petitioner's

business were necessarily involved in the Court of Appeals decision and are necessarily involved in the decision of the issues here on review.

Furthermore, the facts shown by this record of the operation of the pools prior to the RCA settlement in 1957 are relevant and pertinent evidence on the nature of the pools and their tendency to damage petitioner's business by their cumulative effect.

In *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690, 709, 710 (1962) this Court stated:

> "Petitioners sought to introduce evidence that the conspiracy and monopolization alleged began in the early 1930's, that overt acts in furtherance thereof occurred in the 1930's and that it was pursuant to this anti-competitive scheme that respondents sought to and did eliminate petitioners from the vanadium industry after 1938. This evidence was clearly material to petitioners' charge that there was a conspiracy and monopolization in existence when they came into the industry and that they were eliminated in furtherance thereof."

This Court, in that same case, stated at p. 699 of its opinion "in cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. *United States* v. *Patten*, 226 U. S. 525, 544; and in a case like the one before us the duty of the jury was to look at the whole picture and not merely at the individual figures in it: *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 106 (CA 6th Cir.). See *Montegue & Co.* v. *Lowry*, 193 U. S. 38, 45, 46, 48 L. Ed. 608, 611, 612."

As stated in the *Shoe Machinery* case cited above, the effect of this instant conspiracy constituted a continuing violation of the Sherman Act which caused "continuing and accumulating harm" to Petitioner's foreign business.

In our main brief (p. 13) we have shown that the pool sent out continuous "warning notices" to the trade (A. Def. Ex. 134; A. 1869) seeking to induce a boycott of imported radio and television sets. The pool held meetings with dealer organizations seeking to impose such a boycott and sent out notices to the trade papers that "newspapers from coast to coast carry the tremendous total of 4,343,084 advertising messages to help put a stop to the importation of cheap, substandard imported radios." (A. 1863)

The Court of Appeals dismissed from consideration any damaging effects not shown to have been initiated within the damage period. The record shows that the activities of the Canadian pool have been going on since 1926 and their effects on people Zenith sought to do business with were cumulative. Those effects obviously did not come to a halt merely because the damage period started on a certain date in June 1959, because the Pool was still operating at a permanent address and with a permanent staff (Pl. Ex. 50(a); A. 2812-2829).

The respondents admitted a threat of the pool to assert pool patents against Zenith during the damage period but say such threat could not damage Zenith as a matter of law. Although the warning notices (A. 1869) by their terms sought to induce a boycott of the trade against Zenith products it is claimed that this could result in no damage as a matter of law. It would seem to be self evident that this activity was intended to and did damage Zenith's business. That such activity would necessarily damage Zenith's business was admitted by respondents' own witness Henderson (A. 701, 703-5) and by the Royal Commission report (Pl. Ex. 50A, A. 2812) introduced in evidence by respondents themselves.

The respondents made no effort and adduced no testimony or other evidence to show that the illegal activity of

the pools had ever ended prior to the entry of an injunction in this case. In fact, their counsel admitted that the pools were still in existence and that Hazeltine companies were still participating therein a year after the case was tried (A. 3036) and, "that these arrangements have continued and, so far as I know, are in existence today. There is no question about that."

In the instant case, having shown the inception by conspiracy of the continuing and cumulative activities of the pool which were designed to control an entire industry, these activities were presumed to continue until respondents had shown by proof that they had ended. (See *U. S.* v. *Kissell*, 218 U. S. 601, 607-8 (1910); *Hyde* v. *United States*, 225 U. S. 347, 369 (1912); *Local 167, I. B. T.* v. *United States*, 291 U. S. 293, 297-8 (1934).

(b) The Injunction.

As we have pointed out in our original brief, the question of whether illegal patent pools posed a threat to Zenith's business in the markets involved is before this court for determination because the court below has vacated the injunction against the pools. To determine the question this court must necessarily determine whether or not a conspiracy has been proven and is illegal, and whether or not the intended damage to Zenith's business constitutes a threat to that business within Section 15 of the Clayton Act.

Respondents now say, by affidavit of David Westerman, president of Hazeltine Corporation, that they have sought a modification and termination of the agreement licensing Canadian Radio Patents, Ltd. with Hazeltine patents which, by its terms, was not subject to termination "until June 30, 1966", which was two years after the case was tried.

Under the terms of the district court's decree, the Hazeltine companies were enjoined from continuing in any of the

pools (A. 3080). Since there was no stay or supersedeas entered during the appeal on the injunction order (A. 3080) if Hazeltine had not taken steps to get out of the pools it would have been in contempt of court. How they improve their legal position by filing an affidavit of compliance as an exhibit to their brief is not pointed out. That the injunction greatly improved Zenith's Canadian business is shown at pp. 83-84 of our original brief.

It must be apparent to this Court that the entire Canadian business of Zenith is threatened with disaster and complete destruction unless the injunction against the Canadian pool is reinstated. As is shown by respondents own exhibit, plaintiff's exhibit 50A (A. 2811; 2829-30) the pool has some 5,000 patents which it can assert against Zenith. Hazeltine has nine color patents whose Canadian counterparts are in the pool, and which Hazeltine says control the color television business (A. 946). It now appears that Zenith's television business in Canada amounts to over twelve million dollars per year (App. B to main brief, p. A. 26). If any one of the patents in the pool can be sustained against Zenith's television sets, Zenith becomes liable for millions of dollars of damages and suits can be maintained by respondents against its distributors and customers, and confiscation of its products will follow under the Canadian patent law (A. 458). If such an injunction is not reinstated the only way that Zenith could get a pool license and continue in business in Canada would be to build a factory at a cost of millions of dollars, abandon its export business and pay off in damages to the Pool or engage in expensive and never ending litigation over the validity of the 5,000 pool patents.

We doubt that a more drastic and disastrous prospect has ever faced a litigant such as Zenith under the anti-trust laws. If the decision of the court below is permitted to stand then such laws cannot prevent the threatened

damage from the illegal Canadian pool, and we most respectfully submit that then such laws have no sanctions whatever for the protection of American export business and that such result would be gleefully bruited around the world by the greatest conspiracy of competitors which any individual company has ever faced in an effort to export its products to the markets of the world.

(c) The Court of Appeals Did Not Apply the Correct Legal Standard in Reversing the Trial Court.

At p. 61 of our original brief, we quoted from *Continental Ore Co.* v. *Union Carbide Corporation,* 370 U. S. 690, 696 (1962) as follows:

> "The Court of Appeals was, of course, bound to view the evidence in the light most favorable to Continental and to give it the benefit of the inferences which the evidence fairly supports, even though contrary inference might reasonably be drawn."

At p. 84 of respondents' brief, the statement is made that *Continental Ore* cannot be relied upon for the purposes cited because it was a jury case and because the court of appeals decided: "That the verdict for the defendants should have been directed."

We submit that the rule we quoted applies in the instant case. In the first place, the same rule as to the inferences and intendments applies to the findings of the trial judge as applies to a jury verdict.

In *Indemnity Insurance Co.* v. *Pioneer Valley Savings Bank,* 343 F. 2d 634, 644 (8th Cir. 1965) it is stated:

> "Moreover, in appellate review of a decree in equity, and similarly of a judgment in an action at law tried by the court upon waiver of a jury trial, the prevailing party is entitled both to the acceptance by the reviewing court of that view of the evidence which is most favorable to such prevailing party, and likewise to

> the benefit of all favorable inferences which may reasonably be drawn from the facts proved, and if, when so viewed, there be substantial evidence to sustain the findings of the trial judge, then the judgment may not be reversed by the appellate court, unless it be against the clear weight of the evidence, or unless it be influenced by an erroneous view of the law."

In *St. Louis Testing Laboratories* v. *Mississippi Valley Structural Steel Co.*, 375 F. 2d 565, 566 (8th Cir. 1967) the court said:

> "We have in mind the accepted standards that, in a case tried by the court, its findings are presumptively correct; that we are to take that view of the evidence favorable to the appellee; that the findings are not to be disturbed unless clearly erroneous and that the appellee is entitled to the benefit of all favorable inferences."

To the same effect is *Barber-Greene Co.* v. *Bruning Co.*, 357 F. 2d 31 (8th Cir. 1966) at p. 36.

This court's decision in *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 395 (1946) cited at p. 81 of respondents' brief is not in point. This court reversed because it found contemporaneous documents which were undisputed and uncontradicted in evidence which were in conflict with defendants' denials they were in a conspiracy. In the instant case, the converse is true. Here the Petitioner's evidence of conspiracy and of damage is documentary and undenied and corroborated by the post trial results of Zenith's business in Canada when protected by the trial court's injunction.

II.

THE AMOUNT OF PETITIONER'S DAMAGES WAS PROPERLY PROVEN AND IS HERE FOR DECISION UNDER THE PRECEDENT OF THE BIGELOW CASE.

This record shows that the illegal conspiracies in Canada, England and Australia have been in force for well over a quarter of a century. In Canada the conspiracy has completely destroyed an open market since 1926 (P. Ex. 50A; A.2811, 2829-30). Ordinarily, a comparison of petitioner's profits while operating without restrictions, with profits made in a restricted market would be a proper proof of petitioner's damages, *Bigelow et al.* v. *RKO Radio Pictures, Inc. et al.*, 150 F. 2d 877. As we have pointed out since the injunction was issued against the pool Zenith has had an open market in Canada and has done over twice as much business as it did before in Canada (App. B to our main brief, pp. A25-A41). However, at the time of the trial no such comparison was possible since the respondents and their co-conspirators had destroyed such comparisons because they destroyed an open market. The best evidence available to Petitioner for a comparison was the evidence of petitioner's results in the open market in the United States with petitioner's results in the restricted Canadian market. This was the comparison used and there was no objection to it as to competence or relevance in the trial court. Further, there was no question raised on this record of the competency or relevance of defendant's exhibit 220 (A. 324, 2661, 716-64), used as proof of the amount of petitioner's damage.

There is an attempt, in respondent's brief, to reargue the weight of the evidence. That such an issue cannot be entertained here is shown in the case of *Milwaukee Towne*

Corp. v. *Loew's Inc. et al.*, 190 F. 2d 561, 566 (7th Cir. 1951), where the Court of Appeals stated:

> "Neither do we need to follow defendants in their detailed argument designed to show numerous fallacies and inaccuracies in the exhibit prepared and submitted by plaintiff's accountant, for the reason that under the rationale of the *Bigelow* case we are satisfied that it was within the province of the trier of the facts to rely upon the computation there disclosed, providing, of course, there was proof of the fact of damage."

There was no denial of the amount of Zenith's damages and no countervailing testimony or exhibits offered at the trial. The question therefore resolves itself into whether or not the damage exhibits had any value at all as evidence in the case. That question is resolved in *Bigelow et al.* v. *RKO Radio Pictures, Inc. et al.*, 327 U. S. 251, 267 (1946) where this court said:

> "• • • The wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's conduct has rendered unavailable. • • • The constant tendency of the courts is to find some way in which damages can be awarded where the wrong has been done. Difficulty of ascertainment is no longer confused with the right of recovery for a proven invasion of the plaintiff's rights."

Further, under this decision the amount of plaintiff's damages is inextricably bound up in and becomes a substantial part in the proof of the "fact of damage". The question here is whether or not the pools had caused monetary damage to petitioners' radio and television business; the proofs of the amount of damage show that they did.

This, we submit, is not an issue to be remanded to the lower court as respondents now assert but one that can be determined here on proofs to which there is no denial.

While it is contended that this court can not decide the issue of the amount of damage because the Court of Appeals did not decide it; in *Bigelow* the Court of Appeals did not pass on the amount of petitioner's damages either but attempted to dispose of the entire case on a determination that there was no "fact of damage." This court reversed the Court of Appeals on the "fact of damage" issue and approved the finding of the amount of damages without remanding the case for further decision by the Court below.

III.

THE MISUSE DEFENSE IS NOT MOOT.

We have already pointed out at pp. 102-113 of our original brief that there is no defense to the misuse issue and we need not repeat that argument here. It is now argued that because petitioner's counsel in the trial court argued that the package licensing provisions of the tendered licenses were illegal in and of themselves, irrespective of whether the general overall conspiracy was proved, that therefore counsel abandoned the contention that the conspiracy also made out the misuse defense. This is too ridiculous a contention to justify any extended argument.

In the first place, no such concession was made. In fact, it was argued throughout the trial that all of Hazeltine's licensing activities were tied in with the activities of the pool and that the conspiracy was enforced and implemented by the refusal of the respondents to grant domestic licenses unless limited in such a way as to prevent a foreign license being created by implication. It was argued throughout the case that the refusal of Hazeltine to grant unrestricted domestic licenses, discussed at pp. 72-3 of our original brief was tied into the conspiracy and designed to prevent the domestic licensee from obtaining a license to export

by operation of law. It is now claimed that the issue is moot. It is admitted at p. 160 of respondents' brief that "the court did reject two of Zenith's misuse arguments and modified two paragraphs of the injunctive decree relating to license offers on Hazeltine Research's domestic patents."

Since petitioner seeks reversal of these modifications of the injunction decree and this court has granted certiorari on the questions, it is difficult to see why the questions are moot.

The entire issue is discussed at pp. 102-113 of our original brief and need not be reargued here.

IV.

THERE WAS NO MERIT IN HAZELTINE'S POST TRIAL MOTIONS AND THEY WERE PROPERLY DENIED BY THE TRIAL COURT.

With extensive argument and offers of proof in post trial proceedings in the trial court, respondents sought and were denied a new trial in the District Court. The issue of whether or not respondents were entitled to a new trial has been by argument and innuendo submitted for determination to this court. As we shall show, nothing but legal issues were presented by the post-trial motions and there is no occasion for remanding the issue for a ruling by the Court of Appeals.

This Court stated in *Velk* v. *St. Louis, S. F. R. Co.*, 220 U. S. 580 (1911) that "as the case is here upon certiorari to review a judgment of the Circuit Court of Appeals, this Court has the entire record before it with the power to review the action of that court as well as direct such disposition of the case as that court might have done." . . . (220 U. S. at p. 588.)

On March 29, 1965, a year after the case had been tried

and shortly after findings and conclusions had been entered by the trial Court; respondents, represented by new counsel, filed motions to set aside the court's findings and to grant a new trial (A. 2939, 2951).

As a first ground for the motion, respondents charged that L. B. Dodds, their trial counsel, was surprised by a variance between the pleadings and the proofs. The trial court disposed of this contention by saying:

> "The Court: I think the pretrial proofs show that he was not suddenly confronted with this, because the pretrial briefs filed many months before trial indicated to Mr. Dodds what the theory of the case was." (Court of Appeals App. 1865.)

As a second ground, Hazeltine argued that the statute of limitations, as well as the release of the RCA-Zenith litigation would have been pleaded if they had understood the nature of the petitioner's claims. However, the trial court ruled both these defenses insufficient as a matter of law (A. 3062), even if they had been properly pleaded.

As a third ground Hazeltine contended that Zenith had failed to establish the fact and amount of damage. This was raised by motion to dismiss and the trial court ruled against respondents and the court below reversed so the issue is here for review (A. 3062).

Respondents also submitted offers of proof in support of the motions. These included proof of (1) Zenith's RCA release; (2) Zenith's annual financial reports to stockholders for the period 1957-63, (3) tariffs, taxes and other matters claimed to affect the importation of television and radio sets in the Australian and English markets, (4) changes alleged to be necessary to adapt American television sets for the English market and (5) licenses and licensing practices of the Australian pool (A. 2955-2995).

Hazeltine also filed as an offer of proof an accounting

report prepared by Ernst & Ernst based on an *ex parte* interpretation of Zenith's damages based on additional materials not even in the trial record (A. 2960). Respondents' counsel stated with reference to the above offers of proof that "in asking for this extraordinary relief here that we are not doing so on the ground of newly discovered evidence." (Ct. of Appeals App. 1865.)

All the matters raised by respondents' motions were given full and careful consideration by the trial court after being submitted on briefs and in a three-day oral argument (A. 3086). Following the hearing, the trial court ordered that the case be reopened for the sole and limited purpose of determining whether an embargo existed in Australia and England prior to the start of the damage period. The court ruled that no change would be made in the damage findings with respect to Canada and directed Zenith to prepare and submit a judment for damages in Canada and for injunctive relief in the three markets (A. 3038, 3039, 3524-7).

The court disagreed with that part of the Hazeltine argument dealing with the conspiracy and the "fact of damage" and remained convinced that its conclusions were right and said that "I have little hesitancy in saying that I think the evidence warranted doing what I did, and if I had to do it all over again—I would do it all over again." (A. 3086.)

Except for the allowance of a further hearing on the amount of petitioner's damages in England and Australia (A. 3038-9; 3524-7) the court denied the Hazeltine motions, rejected its offers of proof and reaffirmed its findings of fact and conclusions of law (A. 3079). Respondents now argue, and did argue in the Court of Appeals as if the post trial offers of proof constituted actual evidence in the case and were a proper part of the trial record (see respondents' brief p. 55).

There is submitted for decision here by the respondents' argument, the limited issue of whether as a matter of law an abuse of discretion could be shown in the trial court's denial of respondents' motions in view of the fact the evidence offered was admittedly not newly discovered, and the tendered pleas of the statute of limitations and release raised legal issues, which had no merit.

(a) Hazeltine's Offer of Proof Not Constituting Newly Discovered Evidence Failed to Warrant a New Trial as a Matter of Law.

We have already shown that it was admitted that the offers of proof contained no newly discovered evidence. The rule limiting the granting of a new trial to newly discovered evidence is as follows:

> "There must be a showing that the alleged newly discovered evidence was discovered since the trial; facts from which the court may infer reasonable diligence on the part of the moving party; that the evidence is not merely cumulative or impeaching; that the evidence is material; and the evidence is of such character that in a new trial it would probably produce a different result." *McCullough Tool Co.* v. *Wells Surveys, Inc.*, 343 F. 2d 381, 410 (10th Cir. 1965).

See also *Aladdin Mfg. Co.* v. *Mantle Lamp Co. of America*, 116 F. 2d 708, 712 (7th Cir. 1941); *Mayer* v. *Higgins*, 208 F. 2d 781, 783 (2d Cir. 1953).

Since Hazeltine's offers of proof fail in every respect to qualify as newly discovered evidence, there could be no abuse of discretion as a matter of law on the part of the trial court in refusing to grant a new trial.

(b) There Is No Merit in the Claimed Affirmative Defense of the Statute of Limitations.

In the first place, affirmative defenses were waived by the failure on the part of respondents to plead them before the conclusion of the trial. See *Systems Inc.* v. *Bridge Electronics Co.*, 335 F. 2d 465, 466 (3rd Cir. 1964); *Standard Tile Insurance Co.* v. *Roberts*, 349 F. 2d 613, 622 (8th Cir. 1965); *Anderson* v. *National Producing Co.*, 353 F. 2d 834, 838 (2d Cir. 1958).

Secondly, the so-called defense of the statute of limitations was tolled by reason of Section 5b of the Clayton Act.

In the government's civil case of *United States* v. *General Electric, et al.*, civil case No. 410-157, filed by the government on November 28, 1958, in the Southern District of New York, *Hazeltine was expressly named as a co-conspirator.* The complaint and the consequent decree therein were put in evidence by respondents and the decree was entered against the defendant, General Electric on November 1, 1962 (Pl. Ex. 48, A. 2783, 2785-6).

By reason of the pendency of the government's suit, the Federal four years statute of limitations applicable to private anti-trust cases was tolled at all times between November 28, 1958 and November 1, 1963. Consequently, even if the statute of limitations was pleaded, Zenith was entitled to recover in this suit for damages occurring prior to the date of the filing of this counterclaim back to and including November 24, 1954. See *Hardy Salt Company* v. *State of Illinois*, 377 F. 2d 768 (8th Cir. 1967); Cert. Den. 389 U. S. 912 (1968).

Since only four years of damages prior to the filing of the instant counterclaim were sued for, it is a little difficult to see what merit there could be in the statute of limitations defense.

(c) The Release.

The contention made that a release of an antitrust suit in October 1957 could release an action for damages because of a continuing conspiracy in 1959 is likewise a little difficult to understand. This court has held that future causes of action for tort liability cannot be released. See *Lawler* v. *National Screen Service Corp.*, 349 U. S. 322, 327-8 (1955).

Since the damages entered in the district court only included damages from June 1, 1959 to May 31, 1963, the four year damage period subsequent to the 1957 release, the release defense obviously has no merit even though it had been properly pleaded.

V.

THE DISMISSAL FROM THE SUIT OF HAZELTINE CORPORATION IS NOT JUSTIFIED ON THIS RECORD.

Respondent Hazeltine Corporation has filed a separate brief seeking an affirmance of the decision of the Court of Appeals reversing the trial court's finding of jurisdiction (A. 2893) and dismissing respondent from this case. The only contentions made are that (a) the stipulation relied upon by Zenith was signed only by named parties to the counterclaim and (b) that the judgment was not based on an *alter ego* doctrine.

Since, if Hazeltine Corporation was the *alter ego* of its child or subsidiary, when its counsel did sign the stipulation, then it did in fact sign—the question really is—can a decision of the district court be sustained on the *alter ego* theory? Respondent Hazeltine Corporation says it cannot because it says that the trial court's decision cannot be sustained except by the literal terms of the stipulation itself.

Respondent bases this conclusion on its statement at

p. 30 of its separate brief that "during the argument on the special appearance, the court never once referred to the *alter ego* doctrine or to any supposed evidence on that question. Instead his remarks and inquiries to counsel related to the stipulation."

In the first place, the statement is erroneous. The court at the hearing referred to by respondent said to Kayser, respondents' counsel "The Court: The basis for your argument, I assume, is that a child cannot bind its parent. Mr. Kayser: That is part of it, but it goes beyond that, your Honor." (A. 3043).

This colloquy shows that the trial court knew from the entire record that the "child" was binding its "parent" both factually and legally.

However, assuming arguendo that the trial court confined its reasoning to the literal terms of the stipulation itself that would not preclude petitioner from showing that the ruling of the district court was correct.

In the case of *Helvering* v. *Gowron*, 302 U. S. 238 (1937) at p. 245, this court stated:

> "In the review of judicial proceedings, the rule is settled that if the decision below is correct it must be affirmed, although the lower court relied upon a wrong ground and gave a wrong reason."

Here the record is abundantly clear that Hazeltine Corporation submitted the issue of whether or not it was in the case by virtue of the stipulation for determination by the trial court (A. 3043). If the trial court had jurisdiction to decide the issue then the case of *Hansberry* v. *Lee*, 311 U. S. 32, 40-41 (1940), upon which respondents rely, is not in point and no Constitutional question is involved here.

In *Hansberry*, the petitioner had not appeared in the court below before judgment was entered. Petitioner, there, had not asked for a determination of the issue of

whether or not the court in the prior suit had personal jurisdiction over the litigant. In that case the petitioner never appeared in the first suit and the question was raised collaterally in a second suit by respondent attempting to assert that the prior suit had adjudicated the issues in the second suit on the merits against the petitioner on the theory that the first suit was a class suit. In *Hansberry*, the petitioner stayed out of the original suit and treated it as a nullity. Here the respondent came into court and asked for an adjudication on the entire record of whether or not the court had personal jurisdiction over the respondent and made this contention before any judgment was entered in the case. Obviously the respondent was before the court voluntarily, free to raise any question as to jurisdiction available in the entire record of the case and reopen the case for further proofs. Obviously no jurisdictional question is presented and the only question is whether the respondent submitted its person to the jurisdiction of the Court. This is a factual question which the Court of Appeals made no attempt to review.

(a) Hazeltine Corporation Waived Any Objection to Personal Jurisdiction by Consent, Agreement and Acts Constituting a General Appearance.

We submit that, the only issue which can be presented here is whether or not jurisdiction over the person of respondent was conferred by stipulation or acts constituting a general appearance. In the case of *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167 (1939), the court said:

> "The jurisdiction of the Federal courts, their power to adjudicate, is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit—the place where

> judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the Federal courts. * * *
>
> "Being a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause or by submission through conduct."

At the outset, this court should observe that by proposed finding of fact No. 8 (A. 2914) respondent admitted jurisdiction of the subject matter, described itself and its parent Hazeltine Corporation under the heading of jurisdiction and parties, and described the stipulation here as having been entered into to avoid the otherwise triable issue of whether or not "it is appropriate to 'pierce the corporate veil'."

As we have pointed out at pp. 121-2 of our original brief, Hazeltine Corporation sought affirmative findings sanctioning all aspects of its foreign licensing activities. *Since Hazeltine Research, Inc. had no foreign patents, this proposed finding had to be for the benefit of the parent company.* If these proposed findings had been entered, this court would have found Hazeltine Corporation making the same arguments in favor of the district court's jurisdiction as we have made here and we would have had no answer to them.

(b) The Trial Court's Decision Necessarily Adjudicates That the Subsidiary Was the Alter Ego of the Parent and That the Two Are One Corporation.

It is contended that on contract principles, Hazeltine Corporation was not bound by the stipulation because it was signed by L. B. Dodds acting as plaintiff's counsel and not acting as the vice president of Hazeltine Corporation.

This ignores the reason for the stipulation, that the two

companies were the same. In its proposed finding No. 8, the consolidated company stated (A. 2914) that the two companies were to be considered as one in order to avoid the necessity of proving the two companies were the same or that each was the *alter ego* of the other. In *Allied Chemical Co.* v. *Randall*, 321 F. 2d 320, 323 (7th Cir. 1963), it was stated:

> "The effect of applying the alter ego doctrine of course, is that the corporation and the person who dominates it are tried as one person, so that any act committed by one is attributed to both, and if either is bound, by contract, judgment or otherwise, both are equally bound."

Obviously, if the *alter* ego doctrine applies, the signature of Hazeltine Research, Inc. by Dodds, its attorney, bound the parent Hazeltine Corporation.

Respondents contend that because the stipulation in question was signed by L. B. Dodds, only for the research company, then therefore, it is not bound. Similar arguments have been rejected by other courts dealing with the issue. See *Fisser* v. *International Bank*, 282 F. 2d 231, 233-5 (2d Cir. 1960); *Weisser* v. *Murson Shoe Corp.*, 127 F. 2d 344 (2d Cir. 1942).

Respondents further assert that being a Delaware corporation, with its principal office in New York, it could not have been served here for its antitrust violations because of a lack of venue. This ignores the fact that the parent directed the starting of the instant case (A. 131-2) which the trial court found to be a part of the overall conspiracy alleged in the counterclaim (A. 67-8; 2857) and the further fact that the subsidiary is the agent of the parent so no question of venue is involved.

See *U. S.* v. *Scophony Corp.*, 333 U. S. 795, 808 (1948).

It appears from this record that Hazeltine Corporation, has at all times been present in this case since it caused to be filed the original complaint in 1959 as a part of and pursuant to the Canadian conspiracy; the trial court so found (A. 2857) and reiterated that finding after Hazeltine Corporation appeared in the case. Such finding makes Hazeltine Corporation a party to this case unless this court finds there is no substantial evidence to support it.

Here the stipulation was repudiated only after new counsel had been hired. This tactic is not new. It is not looked on with favor by the courts. See *Merrill* v. *United Air Lines, Inc.*, 25 F. R. D. 68, 78-9; affirmed 288 F. 2d 218, 220 (2d Cir. 1961).

As we have already pointed out in our original brief, Dodds and Ruestow tried the case for respondents and submitted proposed findings of fact on every issue in the case. This was a submission by Hazeltine Corporation to the jurisdiction of the trial court. See *Louisville & N. R. Co.* v. *Schmidt*, 177 U. S. 230, 237 (1900); *Ocean Accident and Guaranty Co.* v. *Felgemaker*, 143 F. 2d 950, 952 (6th Cir. 1944).

Finally, the trial court's knowledge of the stipulation and how it was formulated in pretrial hearings was first-hand, intimate and detailed. As often happens where a judgment is large, positions that counsel would not ordinarily have the temerity to advance are presented as a last gasp in a losing case. As the late Mr. Justice Holmes stated in *Sanitary District of Chicago* v. *United States*, 266 U. S. 405, 425 (1925):

> "• • • cost and importance, while they add to the solemnity of our duty, do not increase the difficulty of decision except as they induce argument on matters that, with less mighty interests, no one would venture to dispute."

CONCLUSION.

For the reasons stated here and in our original brief, it is respectfully submitted that the judgment below insofar as it changed, reversed or modified the trial court's decision of the case should be reversed and the judgments entered by the district court reinstated.

Respectfully submitted,

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